

Vong Ban Hin v Laksamana Realty Sdn Bhd**A**

HIGH COURT (MELAKA) — CIVIL APPEAL NO 12-55 OF 2001

LOW HOP BING J

3 APRIL 2003

Civil Procedure — *Appeal* — *Record of appeal* — *Limitation period for filing record of appeal* — *Whether filed out of time* — *Whether decision appealed against was final decision as opposed to interlocutory decision* — *Whether O 49 r 6 of the Subordinate Courts Rules 1980 applicable as opposed to O 49 r 3A* — *Subordinate Courts Rules 1980 O 49 rr 3A & 6*

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This was an appeal by the appellant ('the defendant') against the decision of the learned sessions court judge who had dismissed the defendant's application by way of a notice of application under O 24 r 1(1) of the Subordinate Courts Rules 1980 ('the SCR'), wherein the defendant sought an order that final judgment together with other reliefs be given to the defendant. At the outset of the hearing of this appeal, the respondent ('the plaintiff') raised a preliminary objection on the ground that the defendant's appeal record had been filed out of time. The question for determination was, in an appeal from a decision made pursuant to an application filed under O 24 r 1(1) of the SCR, what is the period limited for the filing of the appeal record.

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Held, dismissing the appeal:

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(1) A 'non-trial decision' is a decision made pursuant to an application filed by way of a notice of application in a subordinate court. On the other hand, a 'trial decision' is a decision which is made by a subordinate court after a trial. The defendant's application was a notice of application which was adapted from Form 65 in Schedule A to the SCR and filed pursuant to O 24 r 1(1) and (2), to be heard in chambers. In the circumstances, a decision made thereon was a 'non-trial decision' within the ambit and purview of O 49 r 6(1). That being the case, the provisions of O 49 r 6 would apply, as it is the established practice in all interlocutory proceedings (see pp 361G, 362B, E-F).

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(2) Order 49 r 3A(3) does not apply to the filing of an appeal record in an appeal from a 'non-trial decision' but instead regulates the filing of an appeal record for the purposes of pursuing an appeal from a 'trial decision' as the appeal record must mandatorily contain, inter alia, the notes of evidence, the grounds of judgment or any memorandum of appeal. These three latter documents are expressly excluded under O 49 r 6(3). Further, O 49 r 3A(3) has made no mention of proceedings in chambers or an appeal to a judge in chambers (see p 363D-E).

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(3) The appeal record has to be filed within three weeks after the filing of the notice of appeal under O 49 r 6(3). The appeal record filed by the defendant was some ten months later. Thus it was fundamentally flawed in that it went beyond the time limited for

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A such filing. Since the appeal record had been filed out of time without any application for extension or enlargement of time, the appeal record had contravened O 49 r 6(3) and the defendant's notice of appeal was thus, incompetent (see p 363A, G-H).

[Bahasa Malaysia summary]

B Ini merupakan rayuan oleh perayu ('defendan') terhadap keputusan hakim mahkamah sesyen yang bijaksana yang telah menolak permohonan defendan melalui satu notis permohonan di bawah A 24 k 1(1) Kaedah-Kaedah Mahkamah Rendah 1980 ('KMR'), di mana defendan telah memohon satu perintah agar penghakiman muktamad dengan relif-relif lain diberikan kepada defendan. Pada permulaan perbicaraan rayuan ini, responden ('plaintif') telah menimbulkan satu bantahan awal atas alasan bahawa rekod rayuan defendan telah difailkan di luar had masa. Persoalan untuk ditentukan, dalam satu rayuan daripada satu keputusan yang dibuat menurut satu permohonan yang difailkan di bawah A 24 k 1(1) KMR adalah, apakah had masa untuk memfailkan rekod rayuan.

Diputuskan, menolak rayuan tersebut:

- E (1) Satu 'non-trial decision' adalah satu keputusan yang dibuat berikutan satu permohonan yang difailkan melalui satu notis permohonan di mahkamah rendah. Sebaliknya, satu 'trial decision' adalah satu keputusan yang dibuat oleh satu mahkamah rendah selepas satu perbicaraan. Permohonan defendan adalah satu notis permohonan yang diadaptasikan daripada Borang 65 dalam Jadual A kepada KMR dan difailkan menurut A 24 k 1(1) dan (2), yang didengar dalam kamar. Dalam keadaan begitu, satu keputusan yang dibuat di sini adalah satu 'non-trial decision' dalam ruang lingkup dan skop A 49 k 6(1). Jika begitu halnya, peruntukan A 49 k 6 akan terpakai, kerana ia adalah amalan yang ditetapkan dalam semua prosiding interlokutori (lihat ms 361G, 362B, E-F).
- F (2) Aturan 49 k 3A(3) tidak terpakai dalam pemfailan satu rekod rayuan dalam satu rayuan daripada satu 'non-trial decision' tetapi sebaliknya mengawal pemfailan satu rekod rayuan bagi tujuan meneruskan satu rayuan daripada satu 'trial decision' kerana rekod rayuan hendaklah secara mandatori mengandungi, antara lain, nota-nota keterangan, alasan-alasan penghakiman atau apa-apa memorandum rayuan. Ketiga-tiga dokumen tersebut dengan jelas dikecualikan di bawah A 49 k 6(3). Tambahan pula A 49 k 3A(3) tidak menyebut tentang prosiding dalam kamar atau satu rayuan kepada seorang hakim dalam kamar (lihat ms 363D-E).
- H (3) Rekod rayuan perlu difailkan dalam tempoh tiga minggu selepas notis rayuan difailkan di bawah A 49 k 6(3). Rekod rayuan telah difailkan oleh defendan sepuluh bulan kemudian. Oleh itu pada
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dasarnya berlaku kecacatan di mana had masa untuk pemfailan telah lama luput. Memandangkan rekod rayuan telah difailkan di luar masa tanpa apa-apa permohonan untuk lanjutan masa, rekod rayuan tersebut telah bercanggah dengan A 49 k 6(3) dan notis rayuan defendan oleh demikian, adalah tidak kompeten (lihat ms 363A, G–H).]

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Notes

For cases on record of appeal, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1126–1168.

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Cases referred to

Kemajuan Hunda Kredit (Kuching) Sdn Bhd v Titus Chuo Mui Ing [1995] 2 MLJ 542 (refd)

Kwong Yik Bank Bhd v Ansonia Management Associates Sdn Bhd [1999] 1 MLJ 366 (refd)

Natural Art Materials Industries Sdn Bhd & Anor v Oriental Top Ltd [1998] 6 MLJ 313 (refd)

Nikodo (S) Pte Ltd v GVC Karaoke Sdn Bhd [1997] 2 MLJ 742 (refd)

Pembinaan Nadzri Sdn Bhd v Koon Hoe & Co Sdn Bhd [1996] 2 CLJ 1038 (refd)

Soh Keng Hian v American International Assurance Co Ltd [1996] 1 MLJ 191 (refd)

Subran @ Subramaniam all Kunhikuttan v Aladath Putham Veetal Moidutty [1997] 3 MLJ 342 (refd)

Tan Mooi Choo v Fatimah bte Ayob [1997] MLJU 442 (refd)

Thong Kim Chea v Thong Seng & Co Sdn Bhd & Anor [1995] 3 MLJ 481 (refd)

Vong Ban Hin v Laksamana Realty Sdn Bhd [1996] MLJU 104 (refd)

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Legislation referred to

Rules of the High Court 1980 O 2 r 3, O 32, O 56

Subordinate Courts Rules 1980 O 1 r 6, O 24 r 1(1), O 28 rr 1–20, O 49 rr 3A(3), 6(1), (3), Schedule A, Form 65

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Appeal from: Summons No 52–250 of 1994 (Sessions Court, Melaka)

Lim Whei Chun (Tunku Amiruddin & KK Chew) for the appellant.

¶ Amardas (Bashir & Co) for the respondent.

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Low Hop Bing J:

Appeal

Before me is the appeal filed by the appellant ('the defendant') on 11 September 2001 against the decision of the learned sessions court judge who had on 29 August 2001 dismissed with costs the defendant's

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- A** application in encl (85) dated 14 June 2001, wherein the defendant sought an order that ‘penghakiman muktamad dengan relif-relif lain’ (final judgment together with other reliefs) be given to the defendant.

Preliminary objection by respondent-plaintiff

- B** At the outset of the hearing of this appeal before me, Mr J Amardas learned counsel for the respondent (plaintiff), raised a preliminary objection on the ground that the defendant's appeal record has been filed out of time.

He said that the notice of appeal was filed on 11 September 2001 and so the appeal record must be filed within three weeks thereafter, ie on or before 3 October 2001. He contended that since the appeal record was filed on 30 July 2002, it was some ten months after the due date.

- C** As there was no application for extension of time to file the appeal record out of time, he argued that there was no proper appeal before this court, the appeal being incompetent. He relied on *Thong Kim Chea v Thong Seng & Co Sdn Bhd & Anor* [1995] 3 MLJ 481; *Kemajuan Hunda Kredit (Kuching) Sdn Bhd v Titus Chuo Mui Ing* [1995] 2 MLJ 542; *Soh Keng Hian v American International Assurance Co Ltd* [1996] 1 MLJ 191; and *Tan Mooi Choo v Fatimah bte Ayob* [1997] MLJU 442.

Defendant's contention

- E** Mr Lim Whei Chun, learned counsel for the defendant, contended that the plaintiff's crucial premise that this appeal was not an appeal against a decision made after trial was a wrong premise. He stressed that the instant appeal is an appeal against a decision made after trial, ie a final decision as opposed to an interlocutory decision. He sought support in *Kwong Yik Bank Bhd v Ansonia Management Associates Sdn Bhd* [1999] 1 MLJ 366;
- F** *Natural Art Materials Industries Sdn Bhd & Anor v Oriental Top Ltd* [1998] 6 MLJ 313; *Pembinaan Nadzri Sdn Bhd v Koon Hoe & Co Sdn Bhd* [1996] 2 CLJ 1038; *Vong Ban Hin v Laksamana Realty Sdn Bhd* [1996] MLJU 104.

- G** He submitted that the defendant's application was to convert an interlocutory judgment into a final judgment, by way of a notice of application under O 24 r 1(1) of the Subordinate Courts Rules 1980 (‘the SCR’).

He reiterated that the appeal herein was against a decision made after trial, and that the defendant did not have to show why the appeal record was filed some ten months after the due date.

- H** He explained that the defendant was working on the applicability of O 49 r 3A of the SCR, as opposed to O 49 r 6 of the SCR, as he had on 14 December 2001 asked for the grounds of decision from the learned sessions court judge, and the reply was that no grounds of decision would be required.

- I** He added that prolonged correspondence ensued and that he had on 18 July 2002 sent the last reminder for the grounds of decision although he has previously been informed that no such grounds were required. Subsequently, the defendant filed the appeal record on 30 July 2002.

Decision of the court

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Question for determination

After giving the aforesaid submissions my most anxious consideration, I am of the view that the question for determination herein may be couched as follows:

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In an appeal from a decision made pursuant to an application filed under O 24 r 1(1) of the Subordinate Courts Rules 1980, what is the period limited for the filing of the appeal record?

Non-compliance with rules

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Before I proceed to consider the answer to the above question, it is necessary for me to observe that both the learned counsel for the plaintiff and the defendant respectively have taken a common stand that notwithstanding the fact that the question brought about by the preliminary objection is fraught with technicalities, it should nevertheless be considered and determined by the court.

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They have achieved a consensus that while O 2 r 3 of the Rules of the High Court 1980 ('the RHC'), as amended vide PU(A) 197/2002 with effect from 16 May 2002, disallows any preliminary objection on the ground of non-compliance with any of the rules of the High Court unless such non-compliance has occasioned a substantial miscarriage of justice, the SCR does not contain equipollent provisions. Hence, learned counsel have presented their respective submission with every vigour.

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In deference to the consensus of these learned counsel, I have decided to consider the merits of their submissions and give a definitive answer thereto.

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The route to that answer may be established by upholding one of the two sharply contrasting submissions pertaining to the applicability of O 49 r 6 of the SCR which the plaintiff's learned counsel urged this court to invoke, or O 49 r 3A of the SCR which the defendant's learned counsel implored the court to confirm.

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Order 49 r 6 of the Subordinate Courts Rules 1980

The relevant provisions which call for consideration and determination are O 49 r 6(1) and (3) of the SCR which are reproduced *in extenso* as follows:

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Appeal to Judge in Chambers of the High Court (O 49 r 6)

- (1) Notwithstanding anything contained in this Order, an appeal from any decision other than a decision made after trial by the court shall lie to a Judge in Chambers of the High Court,
- (2) ...
- (3) *Within three weeks after the filing of the notice of appeal*, the appellant shall file the record of appeal in the High Court, and the record shall contain copies of:

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- A (a) the application for the decision;
(b) all pleadings filed;
(c) all affidavits filed in support of or in opposition to the application; and
(d) the order or draft order of the decision appealed from:

B Provided that the record of appeal shall not include the notes of evidence, the grounds of judgment or any memorandum of appeal. (Emphasis added.)

In my view, the provisions contained in O 49 r 6(1) of the SCR are clear and unambiguous. The opening words, 'Notwithstanding anything contained in this Order' must be construed to mean that in the event of any conflict or inconsistency with any other rules contained in O 49, eg O 49 r 3A(3) of the SCR, the provisions in O 49 r 6(1) of the SCR shall prevail.

C Under O 49 r 6(1) of the SCR, it is also clear to me that the process of appeal contained therein shall only apply to an appeal from a decision other than a decision made after trial and such an appeal shall lie to a judge in chambers of the High Court.

D The use of the operative words 'any decision other than a decision made after trial' in O 49 r 6(1) of the SCR means that a distinction or dichotomy has been devised between a 'non-trial decision' and a 'trial decision' so that O 49 r 6(1) of the SCR applies wholly and exclusively to an appeal from a 'non-trial decision' to the exclusion of a 'trial decision'.

E *'Non-trial decision' and 'trial decision'*

F What then is a 'non-trial decision', or conversely a 'trial decision'? The Rules Committee in enacting O 49 r 6(1) of the SCR, did provide some indication by categorically stating that an appeal against a 'non-trial decision' shall lie to a judge in chambers of the High Court, which means that a non-trial decision is a decision made by a subordinate court in the same way as a decision is made by the registrar of the High Court in chambers, whereby an appeal therefrom would also lie to a judge in chambers of the High Court under O 56 of the RHC.

G A 'non-trial decision' is therefore a decision made pursuant to an application filed by way of a notice of application in a subordinate court. The defendant's application was admittedly filed under O 24 r 1(1) of the SCR and is an application in chambers identical to an application by way of summons in chambers filed under O 32 of the RHC before registrars.

H Order 24 r 1(1) of the SCR refers to an application for the purposes of proceedings in chambers. Order 49 r 6(1) of the SCR also refers to an appeal to a judge in chambers. Naturally, an appeal from a decision made pursuant to an application filed under O 24 r 1(1) of the SCR should lie to a Judge in chambers under O 49 r 6(1) of the SCR. Such a decision is also known as an interlocutory decision.

I In *Nikodo (S) Pte Ltd v GVC Karaoke Sdn Bhd* [1997] 2 MLJ 742, Abdul Kadir Sulaiman J (as he then was) held, inter alia, that O 49 r 6(1) of the SCR prior to the amendment in 2000, applies to an appeal against an

interlocutory order made by a subordinate court and such an appeal lies to a judge in chambers (see also *Subran @ Subramaniam all Kunhikuttan v Aladath Putham Veetal Moidutty* [1997] 3 MLJ 342 per Azhar JC (as he then was); *Tan Mooi Choo and Kemajuan Hunda*). The amendment effected vide PU(A) 342/2000 has retained the provision governing an appeal to a judge in chambers.

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On the other hand, a 'trial decision' is in my view a decision which is made by a subordinate court after a trial. The word 'trial' is not defined in the SCR but the word 'hearing' is defined in O 1 r 6 as meaning any proceedings in court ie open court or in chambers.

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Order 28 of the SCR contains detailed provisions governing hearing. It seems apparent to me that a clear distinction is made between a hearing and a trial, in that under the provisions of O 28 rr 1-8 thereof, a hearing would cover a hearing of all types of proceedings, while under O 28 rr 9-20 of the SCR, a trial is confined or narrowed down to more specific proceedings, in particular the trial of the entire suit or action, which practically includes, eg the calling of witnesses who are to give viva voce evidence under O 28 r 13 of the SCR; or the trial judge's inspection of any place or thing under O 28 r 17 of the SCR. A decision made thereon is in my view a 'trial decision' to which O 49 r 6(1) of the SCR would not apply. It is an exception expressly excluded therefrom. A trial means a full trial (see *Kemajuan Hunda*). A trial does not proceed by way of a notice of application under O 24 r 1(1) of the SCR, but is conducted in open court pursuant to O 28 rr 9-20 of the SCR.

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Defendant's application in encl (85) is a 'Notis Permohonan', ie a notice of application which is adapted from Form 65 in Schedule A to the SCR and filed pursuant to O 24 r 1(1) and (2) of the SCR, to be heard in chambers. In the circumstances, there is absolutely no doubt in my mind that a decision made thereon is a 'non-trial decision' within the ambit and purview of O 49 r 6(1) of the SCR. That being the case, the provisions of O 49 r 6 of the SCR would apply as it is the established practice in all interlocutory proceedings.

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Under O 49 r 6(3) of the SCR, the time limited for filing the appeal record is within three weeks after the filing of the notice of appeal on 11 September 2001, and that should be on or before 3 October 2001. Being an appeal against a 'non-trial decision', the appeal record under O 49 r 6(3) of the SCR shall consist of four documents only viz the application, pleadings, affidavits and order or draft order of the decision appealed from, but not the notes of evidence, grounds of judgment or memorandum of appeal. The purpose of these provisions is to facilitate expeditious disposal of such appeals.

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In *Kwong Yik Bank*, it was held by the Court of Appeal that the true purpose of O 49 r 6 of the SCR was to provide for a summary and speedy disposal of appeals against decisions of subordinate courts made in interlocutory proceedings, including those under O 26A of the SCR and in all such appeals there is no necessity to file a memorandum of appeal (see also *Vong Ban Hin, Pembinaan Nadzri and Natural Art Materials*).

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- A** That being the case, I hold that the appeal record filed by the defendant herein some ten months later, ie on 30 July 2002 is fundamentally flawed in that it went beyond the time limited for such filing.

Order 49 r 3A(3) of the Subordinate Courts Rules 1980

- B** In the event that I have erred in construing O 49 r 6(1) and (3) of the SCR and hence arrived at an erroneous conclusion, I shall now consider the submission of defendant's learned counsel in support of the defendant's appeal, ie the appeal record was filed within the time limited under O 49 r 3A(3) of the SCR.

- C** Order 49 r 3A(3) reads as follows:

3A Appeal record where appellant is represented (O 49 r 3A)

- (3) Two copies of the appeal record shall be filed in the High Court within six weeks of the receipt of the notification from the court appealed from that the certified copies of the notes of evidence and the grounds of judgment are ready.

- D** Upon a proper perusal thereof, I am of the view that O 49 r 3A(3) of the SCR does not apply to the filing of an appeal record in an appeal from a 'non-trial decision' but instead regulates the filing of an appeal record for the purposes of pursuing an appeal from a 'trial decision' as the appeal record must mandatorily contain inter alia, the notes of evidence, the grounds of judgment or any memorandum of appeal. These three latter documents are expressly excluded under O 49 r 6(3) of the SCR.
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Further, O 49 r 3A(3) of the SCR has made no mention of proceedings in chambers or an appeal to a judge in chambers. I am therefore unable to sustain the submission for the defendant that O 49 r 3A(3) of the SCR applies in order to enable the defendant to file the appeal record within the six weeks therein stated.

- F**
- The defendant's inclusion of the phrase 'penghakiman muktamad' (final judgment) in an interlocutory application under O 24 r 1(1) of the SCR cannot in my view make a decision thereon a 'trial decision' in order to remove it outside the ambit and purview of O 49 r 6(1) and to bring it within O 49 r 3A(3) of the SCR.
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Conclusion

- H** On the foregoing grounds, my answer to the aforesaid question is that the appeal record has to be filed within three weeks after the filing of the notice of appeal under O 49 r 6(3) of the SCR. Since the appeal record has been filed out of time without any application for extension or enlargement of time, I hold that the appeal record has contravened O 49 r 6(3) of the SCR and that the defendant's notice of appeal is incompetent. The inevitable result is that it is hereby struck off and the appeal dismissed with costs.

- I** *Appeal dismissed.*